



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Release Number: **201349022**
Release Date: 12/6/2013
Date: September 10, 2013
UIL Code: 501.03-00

Contact Person:
Identification Number:
Contact Number:
Employer Identification Number:
Form Required To Be Filed:
Tax Years:

Dear :

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code section 501(c)(3). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Because you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at

1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Karen Schiller
Acting Director, Exempt Organizations
Rulings and Agreements

Enclosure
Notice 437
Redacted Proposed Adverse Determination Letter
Redacted Final Adverse Determination Letter



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Date: July 23, 2013

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

LEGEND

X

ABC Group
Subsidiary

Dear :

We have considered your application for recognition of exemption from Federal income tax under Internal Revenue Code § 501(a). Based on the information provided, we have concluded that you do not qualify for exemption under § 501(c)(3). The basis for our conclusion is set forth below.

FACTS

You are duly formed under the nonprofit laws of your state of incorporation. Your Certificate of Incorporation provides that you are organized as a nonprofit corporation to engage "exclusively for one or more of the purposes as specified in Section 501(c)(3) of the Internal Revenue Code..." It further provides that "... the specific objectives and purposes of the Corporation shall be to ensure and facilitate the free open source distribution of the [X] software ("Software") to the general public."

In your exemption application, you stated that you were "formed solely to promote the development, distribution and adoption of the free open source software code and associated documentation comprising the X software application, for benefit of the general public." You describe X software as "a modular suite of computational fluid dynamics software source code and associated documentation, intended to be used to simulate on a computer the motion and flow of fluids (generally air and water) in relation to solid objects, such as vehicles, airfoils, turbines, and buildings." Specifically, you stated that X software is used "for computer-based design processes of everything from buildings (for example, by enabling computer-based simulation of wind patterns around buildings or across an entire city, or the possible spread of fire within a building, etc.), to the design of aircraft, watercraft, automobiles or other vehicles (for

example, computer-based simulation of aerodynamic drag, or the flow of air within a cabin, etc.), to wind turbine or engine design and more." You reported that your software may be utilized by "individuals, academics, government and commercial interests alike."

You are the owner of the copyright of X software source code and associated software documentation, and anyone or any entity may download X software from your website at no cost, pursuant to a no-cost open source license (Gnu Public License or GPL). You explained that you provide "no direct benefit or assistance (including lead generation, marketing, or promotional benefits), to any commercial interest or entities, other than indirectly via such entities benefiting from use of the X software being made available at no-cost to the general public."

You entered into a Trademark License Agreement with Subsidiary, a wholly-owned subsidiary of ABC Group. Your connections with ABC Group include funding, licensing agreements, and overlapping board members. Specifically, you stated that "if the donations don't cover the costs [of] the site [ABC Group] will fund the remaining shortfall if necessary." ABC Group owns the trademark to X Software, which it licensed to you. Your board members are all employees of ABC Group. You stated "the initial (and current) four Directors and three Officers of [our organization] are all employees of the same independent third-party commercial company or its wholly-owned subsidiaries: [ABC Group]." Specifically, you reported that your Director is the Director of ABC Group; your President is the Engineering Director of ABC Group; your Treasurer is also an Engineering Director at ABC Group; and finally, your Secretary is Vice-President at ABC Group.

You also operate a website hosted by ABC Group that is intended to be "a communication and promotional channel to facilitate the sharing of information among interested members of the public, including users of the X software, to promote the software's continued use and encourage further improvement of the software code by its community of users...."

Your day-to-day operations are devoted solely to maintaining your website that hosts and makes available for download X software and its associated documentation. You engage in no other activities. Specifically, you stated that you have "no revenue at present, and anticipates little or no revenue to result from [your] activities in the future. [Your] minimal operating costs are expected to result primarily from the costs incurred to maintain [your] website, as well as periodically preparing mandatory financial and operating reports—and plans to solicit donations from the general public to pay these small ongoing operating expenses." You stated that you "pay no salaries or stipends and [have] no employees, and all assistance given to [you] at present to accomplish [your] purposes is provided on a volunteer basis, including contributions of software code pursuant to the open source GPL license." In addition, you also reported that "an outside company [ABC Group] which hosts [your web] site [is] also expected to keep the site functional. If additions to the site are required they will be created by [ABC Group] staff free of charge."

LAW

I.R.C. § 501(c)(3) exempts from taxation any corporation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention

of cruelty to children or animals, provided no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Treas. Reg. § 1.501(c)(3)-1(a)(1) provides that, in order to be exempt as an organization described in § 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational or operational test, it is not exempt.

Treas. Reg. § 1.501(c)(3)-1(c)(1) provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in § 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Rev. Rul. 65-1, 1965-1 C.B. 226, determined that an organization which promotes and fosters the development and design of machinery in connection with a commercial operation and which has the power to sell, assign, and grant licenses with respect to its copyrights, trademarks, trade names, or patent rights was not exempt under § 501(c)(3). Specifically, the IRS found that any benefit to the public was indirect because the development and licensing of the new machine benefited those particular manufacturers.

Rev. Rul. 69-632, 1969-2 C.B. 120, determined that a nonprofit organization composed of members of a particular industry to develop new and improved uses for existing products of the industry was not exempt under § 501(c)(3). The association itself conducted no scientific research. Rather, it contracted with various research organizations, institutes, and universities for specific research projects selected by a committee of technical experts chosen from the association's membership. The results of these projects were published and made available to the interested public. Specifically, the ruling found that the association's research projects may result in new products and processes that benefit the public, but such benefit was secondary to that derived by the association's members.

Rev. Rul. 74-116, 1974-1 C.B. 127, determined that an organization whose membership was limited to organizations that own, rent, or use a specific type of computer and whose activities are designed to keep members informed of current scientific and technical data of special interest to them as users of the computers was not exempt under I.R.C. § 501(c)(3). The organization was devoted to developing and exchanging data among users of a specific type of computer. Furthermore, the organization served as a liaison between users and the manufacturer of the computer. The organization's activities in furtherance of this goal included conducting meetings and seminars to discuss problems relating to the use of the computer, publishing reports of its meetings and seminars for distribution to members, and publishing a monthly newsletter to inform members of current scientific and technical data of special interest to them. The organization was supported primarily by membership dues and seminar fees. The Service determined that, by making specialized information available to its members under these circumstances, the organization served the private interests of its members rather than a public interest and therefore failed to qualify under I.R.C. § 501(c)(3).

In Better Business Bureau of Washington, D.C. v. United States, 326 U.S. 279 (1945), the Supreme Court determined that the presence of a single non-exempt purpose, if substantial in

nature, will destroy exemption under § 501(c)(3) regardless of the number or importance of any other exempt purposes.

ANALYSIS

Your sole activity is maintaining a website to "promote the development, distribution and adoption of the free open source software code and associated documentation comprising the X software application, for benefit of the general public." An organization seeking tax-exempt status under § 501(c)(3) must be organized and operated exclusively for charitable or other exempt purposes with no part of its net earnings inuring to the benefit of any private shareholder or individual. See Treas. Reg. § 1.501(c)(3)-1(a)(1). An organization is "operated exclusively" for one or more exempt purpose only if it engages primarily in activities that accomplish one or more of such exempt purposes specified in § 501(c)(3). Treas. Reg. § 1.501(c)(3)-1(c)(1). Maintaining a website to promote the development, distribution and adoption of open source software is not an exempt purpose. See Rev. Rul. 74-116; Rev. Rul. 69-632; Rev. Rul. 65-1. Treas. Reg. § 1.501(c)(3)-1(c)(1).

You do not engage in any other activities that establish that you are operated for exclusively exempt purposes. The documentation you have submitted does not show that you meet any of the criteria for exemption. As such, your only activity does not accomplish an exempt purpose. Treas. Reg. § 1.501(c)(3)-1(c)(1). The presence of a single, substantial non-exempt purpose will destroy the exemption regardless of the number or importance of any truly exempt purposes. Better Business Bureau, 326 U.S. 279.

CONCLUSION

Based on the above, we have made a determination that you fail to meet the requirements necessary to be recognized as a tax-exempt organization under § 501(c)(3) because you are not operated exclusively for one or more exempt purposes. You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination.

Your protest statement should be accompanied by the following declaration:

Under penalties of perjury, I declare that I have examined this protest statement, including accompanying documents, and, to the best of my knowledge and belief, the statement contains all the relevant facts, and such facts are true, correct, and complete.

This declaration must be signed by an elected officer, a member of the board of directors, or a trustee rather than an attorney or accountant.

You also have a right to request a conference to discuss your protest. This request should be made ~~when~~ you file your protest statement. An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you. If you want representation during the conference procedures, you must file a proper power of attorney,

Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. For more information about representation, see Publication 947, *Practice before the IRS and Power of Attorney*. All forms and publications mentioned in this letter can be found at www.irs.gov, Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to protest as a failure to exhaust available administrative remedies. Section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848 and any supporting documents to this address:

Internal Revenue Service
TE/GE (SE:T:EO:RA:T3)

You may also fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Karen Schiller
Acting Director, Exempt Organizations
Rulings and Agreements